No. 14-10154

IN THE

Supreme Court of the United States

STEPHEN L. VOISINE AND WILLIAM E. ARMSTRONG, III,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICI CURIAE* THE NATIONAL DOMESTIC VIOLENCE HOTLINE, THE NATIONAL NETWORK TO END DOMESTIC VIOLENCE, THE BATTERED WOMEN'S JUSTICE PROJECT, AND END DOMESTIC ABUSE WISCONSIN *ET AL.* (Additional *Amici* Continued on First Page) IN SUPPORT OF RESPONDENT

ROB (ROBERTA) VALENTE
NATIONAL DOMESTIC VIOLENCE HOTLINE
P.O. Box 161810
Austin, TX 78716
(240) 354-4842
rvalente@ndvh.org

LAUREL PYKE MALSON
Counsel of Record
COLIN M. PROKSEL
JORDAN L. LUDWIG
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 624-2500
lmalson@crowell.com

Counsel for Amici Curiae

[ADDITIONAL COUNSEL LISTED ON INSIDE COVER]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

List of *Amici*

Casa de Esperanza, Connecticut Coalition Against Domestic Violence, First Nations Women's Alliance, Jewish Women International, Kentucky Coalition Against Domestic Violence, Legal Momentum, National Coalition Against Domestic Violence, National Council of Jewish Women, National Network to End Domestic Violence, National Organization for Women Foundation, National Resource Center on Domestic Violence, Nevada Network Against Domestic Violence, New Hampshire Coalition Against Domestic and Sexual Violence, New Jersey Coalition to End Domestic Violence, Praxis International, Vermont Network Against Domestic and Sexual Violence, and Washington State Coalition Against Domestic Violence

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES. iii

INTEREST OF AMICI CURIAE. 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. A Single Criminal Act of Domestic Violence—Even a "Reckless" Act—Nearly Always Falls into a Broader Campaign of Intentional Conduct Meant to Coerce and Control the Victim 6

A. Domestic violence is best characterized as a pattern of conduct intended to subordinate one partner to the power and control of the other. 6

B. The First Circuit faithfully applied this Court's instruction that "domestic violence" is a unique phenomenon that extends beyond traditional "generic" violence. 11

II. In Domestic Violence Situations, Firearms are Instruments that, Even if Not Fired, Further an Abuser's Coercive Control Over the Victim. 12

A. As with all victim support organizations, *Amici* are on the front lines of domestic abuse. 13

TABLE OF CONTENTS
(continued)

Page

B. *Amici's* data demonstrate that abusers employ firearms to control and terrorize their victims. 14

III. Including Misdemeanor Domestic Violence Crimes with the *Mens Rea* of "Reckless" within the Prohibition on Firearm Possession in 18 U.S.C. § 922(g)(9) Is Crucial to Effectuating That Statute's Remedial Purposes. 19

A. The purpose of § 922(g)(9) is to protect victims of domestic violence from further harm by prohibiting individuals with a demonstrated proclivity towards domestic abuse from possessing firearms. 20

B. Carving out individuals who have been convicted of a "reckless" crime of domestic violence from the prohibition on firearm possession in § 922(g)(9) would at least partially reopen the loophole that the Amendment was intended to close and would have a devastating effect on domestic violence victims. 22

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

CASES

Bates v. State,
258 P.3d 851 (Alaska Ct. App. 2011) 7

Fernandez-Ruiz v. Gonzales,
466 F.3d 1121 (9th Cir. 2006).....3, 24

Johnson v. United States,
559 U.S. 133 (2010).....9

People v. Disher,
224 P.3d 254 (Colo. 2010) 7

United States v. Armstrong,
706 F.3d 1 (1st Cir. 2013) 25

United States v. Castleman,
134 S. Ct. 1405 (2014).....*passim*

United States v. Hayes,
555 U.S. 415 (2009).....2, 12, 20, 21

United States v. Huong Thi Kim Ly,
798 F. Supp. 2d 467 (E.D.N.Y. 2011) 23

United States v. Voisine,
778 F.3d 176 (1st Cir. 2015) .....*passim*

STATUTES

18 U.S.C. §§ 921 *et seq.* 2

18 U.S.C. § 921(a)(33) 11

18 U.S.C. § 922(g)(1) 20

18 U.S.C. § 922(g)(8)(B) 20

18 U.S.C. § 922(g)(9) .....*passim*

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TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

142 Cong. Rec. S10377-01 (1996) .....*passim*

Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 Geo. Wash. L. Rev. 552 (2007) 8

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Br. Amici Curiae of United States Senators Frank R. Lautenberg, Dianne Feinstein, and Patty Murray in Support of Petitioner at 9, *United States v. Hayes*, 555 U.S. 415 (2009) (No. 07-608) 22

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Violence, BLACK'S LAW DICTIONARY (10th ed. 2014).....23

INTEREST OF *AMICI CURIAE*[1]

Amici include nonprofit organizations devoted to remedying domestic violence through legislative, legal, and other initiatives, as well as additional organizations dedicated to serving and supporting survivors of domestic violence. Among other things, they provide shelter, counseling, and advocacy services, as well as serving as leaders in developing and implementing the Violence Against Women Act and other laws that provide safety and independence for survivors of domestic violence. *Amici* have hundreds of years of collective experience working with such survivors, including extensive efforts to improve both the criminal and civil justice systems' responses to and prevention of domestic violence.

Over the past decade, *amici* have collected extensive anecdotal and other data, first-hand, from domestic violence survivors. These data show that domestic violence abusers frequently engage in a pattern of abusive conduct that includes the use of firearms to control and terrorize their victims. As a result of this information, *amici* have advocated for decades for safety protections for survivors,

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[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel representing a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.3(a), *amici* state that counsel of record for both Petitioners and Respondent have consented to the filing of this brief—Petitioners through a blanket consent filed with the Clerk of this Court and Respondent through a letter sent to *amici's* counsel. *Amici* are described in the Appendix to this brief.

including the federal prohibition of misdemeanant firearm possession at issue in this case. This prohibition was intended to protect victims of domestic violence from further harm by prohibiting access to firearms by abusive individuals. In furtherance of this goal, ensuring that misdemeanor domestic violence crimes with the *mens rea* of "reckless" are included within the firearm prohibition of 18 U.S.C. § 922(g)(9) is crucial to preventing many forms of domestic violence and limiting the severity of abuse that does occur. For these reasons, *amici* submit this brief in support of Respondent to summarize their experience with the realities of everyday domestic violence.

SUMMARY OF ARGUMENT

In *United States v. Hayes*, 555 U.S. 415 (2009) and *United States v. Castleman*, 134 S. Ct. 1405 (2014), this Court was called upon to interpret the Lautenberg Amendment to the federal Gun Control Act of 1968, 18 U.S.C. §§ 921 *et seq.*[2] The Lautenberg Amendment prohibits individuals who have been convicted of a "misdemeanor crime of domestic violence" from possessing a firearm. 18 U.S.C. § 922(g)(9). This Amendment sought to close a "'dangerous loophole'" in the gun-control laws that allowed many domestic abusers who had not been charged or convicted of felonies to possess firearms. *Hayes*, 555 U.S. at 426 (quoting 142 Cong. Rec. 22985, 22986). This Court has now twice construed

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[2] *Amici* submitted briefs in both *Hayes* and *Castleman* addressing the impact of firearms in domestic violence cases. *Amici's* briefs were cited by the Court in both decisions.

the Lautenberg Amendment to effectuate this remedial purpose. *Amici* respectfully urge this Court to do so a third time here and affirm the First Circuit's decision.

The First Circuit's opinion is grounded in principles articulated in *Castleman*—namely, that "domestic violence" is a "term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context." 134 S. Ct. 1411. The application of this principle here was proper—indeed, necessary. This Court, the federal government, many states, and other nations all have recognized that "domestic violence" involves a pattern of conduct intended to coerce and control the victim. An abuser's pattern of conduct encompasses a broad range of behaviors—some violent, some harassing, some coercive—all of which the abuser intentionally combines to create a complete system of abuse and control. It is therefore incorrect to classify an individual who "recklessly" abuses a domestic partner as acting unintentionally or somehow being less culpable of "domestic violence." Simply put, "[m]en do not beat their wives by accident." *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1136 (9th Cir. 2006) (Wardlaw, J., dissenting).[3]

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[3] While women may perpetrate domestic violence against current or former partners, and intimate-partner violence also occurs in same-sex relationships, the vast majority of victims of domestic violence are women and their attackers, men. *See, e.g.*, Shannan Catalano, Bureau of Justice Stats., U.S. Dep't of Justice, *Special Report: Intimate Partner Violence, 1993-2010*, NCJ 239203 at 1 (Nov. 2012) (approximately four in five victims of domestic violence are female). Accordingly, this brief

(continued...)

Domestic violence is a crime that is the sum of many large and small acts of abuse and coercion.

The presence of a firearm in the home of a domestic abuser is problematic on multiple fronts. First, domestic violence "often escalates in severity over time and the presence of a firearm increases the likelihood that it will escalate to homicide." *Castleman*, 134 S. Ct. at 1408 (citation omitted). In fact, firearm ownership is a, if not the, key predictor of femicide between non-strangers. *See* Michael B. Siegel & Emily F. Rothman, *Firearm Ownership and the Murder of Women in the United States: Evidence That the State-Level Firearm Ownership Rate Is Associated with the Nonstranger Femicide Rate*, 3 Violence & Gender (forthcoming Mar. 2016). Critically, evidence shows that where a firearm is present, a woman is *six times* more likely to be killed. Jacquelyn C. Campbell et al., *Assessing Risk Factors For Intimate Partner Homicide*, DOJ, Nat. Institute of Justice J., No. 250, p. 16 (Nov. 2003). Second, even if a firearm present in the home of a domestic abuser is never fired, the very presence of the weapon is a tool used to terrorize the victim and perpetuate the abuser's power and control. In other words, the firearm remains a potent instrument of domestic violence and control. Several *amici*—principally, the National Domestic Violence Hotline ("the Hotline")—have received thousands of first-hand accounts of such abuse. The emotional and psychological toll of such abuse is devastating,

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(continued...)
describes domestic violence in terms of female victims and male abusers/attackers.

and underscores the need to keep firearms out of the hands of individuals who have a demonstrated proclivity for domestic abuse—whether "reckless" or otherwise.

Finally, the Lautenberg Amendment was intended to "establish a policy of *zero tolerance* when it comes to guns and domestic violence." 142 Cong. Rec. S10377-01 (1996) (emphasis added). In contrast to this clear directive, Petitioners advocate a "sometimes tolerance" policy. Such a policy would be untenable. Based on nothing more than a formalistic *mens rea* distinction found nowhere in the statute, Petitioners' approach would turn § 922(g)(9) on its head, and would reopen, at least partially, the "dangerous loophole" that the statute was intended to close. As the court below observed, "If Congress had wanted to impose a higher *mens rea*, it could have done so explicitly, as it did in the immediately preceding section of the bill that established § 922(g)(9)." *United States v. Voisine*, 778 F.3d 176, 183 (1st Cir. 2015). It did not, and for good reason: individuals convicted of "reckless" crimes of domestic violence pose the same risk of future abuse as individuals convicted of "intentional" crimes of domestic violence.

The decision of the First Circuit should be affirmed.

ARGUMENT

I. A Single Criminal Act of Domestic Violence—Even a "Reckless" Act—Nearly Always Falls into a Broader Campaign of Intentional Conduct Meant to Coerce and Control the Victim.

18 U.S.C. § 922(g)(9) proscribes individuals who have been convicted of a "misdemeanor crime of domestic violence" from possessing a firearm. *Amici* are principally concerned here with the Court's understanding of the complex behaviors that constitute "domestic violence."

A. Domestic violence is best characterized as a pattern of conduct intended to subordinate one partner to the power and control of the other.

It is largely uncontroversial that domestic violence embodies far more than the mere use of physical force. Rather, its animating force is power—physical, emotional, sexual or psychological—over the partner. The Office on Violence Against Women of the U.S. Department of Justice defines domestic violence as "a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimidate partner. Domestic violence can be physical, sexual, emotional, econornic, or psychological actions or threats of actions that influence another person." *Domestic Violence*, U.S. Dep't of Justice, Office on Violence Against Women, http://www.ovw.usdoj.gov/domviolence.htm (last

visited January 25, 2016). Several state agencies and courts, too, have endorsed this view of domestic violence.[4] Even Petitioners themselves concede this essential truth: their brief states, "To be sure, domestic violence is a serious problem, and it often involves an ongoing cycle of behavior between intimate partners or family members that may escalate. Legislative and law enforcement responses have recognized and should recognize it as such." Pet. Br. 25. At bottom, domestic violence "entails a

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[4] *Understanding Domestic Abusers*, New York State Office for the Prevention of Domestic Violence, www.opdv.ny.gov/professionals/abusers/coercivecontrol.html (last visited January 25, 2016) ("Domestic abuse is ongoing, purposeful behavior that is aimed at dominating one's partner, and often one's children as well."); *Domestic Violence*, Tenn. District Attorney's Gen. Conf., http://www.tndagc.org/dv.htm (last visited Jan. 25, 2016) ("Domestic violence is about power and control. It is not just about hitting or punching."); *Domestic Violence / Intimate Partner Violence*, California Department of Public Health, www.cdph.ca.gov/HealthInfo/injiosaf/Pages/DomesticViolence/aspx (last visited Jan. 25 2016) ("California's Domestic Violence Advisory Council defines domestic violence as a spectrum and often a pattern of behaviors that includes physical, sexual, verbal, emotional, and psychological abuse and/or economic control used by adults or adolescents against their current or former intimate partners in an attempt to exercise power and authority. "); *Domestic Violence Awareness Guide*, Oklahoma Department of Human Services 8 (2008) ("Domestic violence is a pattern of behavior used to establish power and control over another person through fear and intimidation. "); *People v. Disher*, 224 P.3d 254, 258 (Colo. 2010) ("That is the hallmark of domestic violence: an action that is used to coerce, control, punish, intimidate, or exact revenge within the context of an intimate relationship."); *Bates v. State*, 258 P.3d 851, 862 (Alaska Ct. App. 2011) (same).

malevolent course of conduct that subordinates women to an alien will by violating their physical integrity (domestic violence), denying them respect and autonomy (intimidation), depriving them of social connectedness (isolation), and appropriating or denying them access to the resources required for personhood and citizenship (control)." Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* 15 (2007).[5]

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[5] *Accord* Margaret E. Johnson, *Changing Course in the Anti-Domestic Violence Legal Movement: From Safety to Security*, 60 Vill. L. Rev. 145, (2015) (defining intimate partner violence as, "a pattern of behavior in a relationship by which the batterer attempts to control his victim through a variety of tactics" (quoting Judy L. Postmus, *Analysis of the Family Violence Option: A Strengths Perspective*, 15 AFFILIA 244, 244-45 (2000)); Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 Geo. Wash. L. Rev. 552, 569 (2007) ("[D]omestic violence is about gaining control of another person."); Camille Carey, *Domestic Violence Tort: Righting a Civil Wrong*, 62 U. Kan. L. Rev. 695, 700 (2014) ("Assault is extremely common in abusive relationships. Abusers seek to control their partners through threats of violence and intimidation."); Bonita Meyersfeld, *Domestic Violence and International Law* 120 (2010) ("Systemic intimate violence too may manifest in a continuum of harm; it is a hybrid of physical, emotional and sexual harm, the effects of which are often invisible."); Lynne Harne & Jill Radford, *Tackling Domestic Violence: Theories, Policies and Practice* 6 (2008) ("[A]lthough domestic violence takes many forms, it is the physical and sexual violence or threats of these forms of violence, that serve to keep the other forms in place, because despite its pernicious nature, psychological violence and emotional cruelty take their power from the threats and realities of physical and sexual violence which contextualize it.").

A proper definition and understanding of "domestic violence" is essential here because in interpreting a statute "[u]ltimately, context determines meaning." *Johnson v. United States*, 559 U.S. 133, 139 (2010). And in this context, as it is properly understood, a single "reckless" act must not be viewed in isolation. But rather, each act is part of ongoing—*purposeful*—behavior to instill fear and gain control over a domestic partner: "Domestic abuse is not just a curse, a slap, or even a severe beating. It is an *intentional, ongoing, purposeful* effort." Elaine Weiss, *Family and Friends' Guide to Domestic Violence: How to Listen, Talk and Take Action When Someone You Care About is Being Abused* 14 (2003) (emphasis added). Stated differently, "[t]he batterer's desire to dominate his victim functions as the animating force behind his abusive behaviors." Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. Crim. L. & Criminology 959, 965 (2004).

A contrary view of domestic violence—that is, one "through the prism of the incident-specific and injury-based definition of violence"—would "conceal[] its major components, dynamics, and effects, including the fact that it is neither 'domestic' nor primarily about 'violence.'" *Coercive Control*, *supra*, at 10; *see also* Tuerkheimer, *supra*, at 961 ("Premised on a transactional model of crime that isolates and decontextualizes violence, [such a] law applied to domestic abuse [would] conceal[] the reality of an ongoing pattern of conduct occurring within a relationship."). Consequently, domestic violence is not properly viewed in isolated, incident-specific occurrences. Such a snapshot approach

ignores the plain realities of domestic violence and accordingly must be rejected.

Indeed, other nations have taken steps to criminalize "coercive control" as a crime of domestic violence. For instance, section 76 of the Serious Crime Act of 2015, proscribes "[c]ontrolling or coercive behavior in an intimate or family relationship" in England and Wales. Serious Crime Act 2015, c. 9, § 76 (Eng.). As stated by the U.K. Home Secretary Theresa May, "Coercive control can be tantamount to torture. In many cases, dominance over the victim develops and escalates over the years until the perpetrator has complete control." *Government to Create New Domestic Abuse Offence*, Home Office (U.K.), https://www.gov.uk/government/news/government-to-create-new-domestic-abuse-offence (last visited Jan. 25, 2016). Similarly, the Canadian Department of Justice has opined that even "[a] single act of violence or emotional intimidation should be classified as a pattern of domestic violence if it causes lingering fear and/or is associated with a pattern of coercive control in the relationship." *Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems, Part 5: Differing Understandings on the Nature of Domestic Violence*, Government of Canada Department of Justice, www.justice.gc.ca/eng/rp-pr/fl-lf/famil/enhan-renfo/p3.html (last visited Jan. 25, 2016). Domestically, there are increasing calls from experts to recognize that any criminal act of domestic violence addressed in the justice system must be viewed within the context of the whole pattern of violent, abusive, and coercive acts perpetrated by the abuser. *E.g.*, Tuerkheimer, *supra*, at 961 ("In this

Article I explore the rupture between women's experiences of battering and the remediation offered by the criminal law.").

B. The First Circuit faithfully applied this Court's instruction that "domestic violence" is a unique phenomenon that extends beyond traditional "generic" violence.

A majority of this Court has already endorsed the above-described view of domestic violence. Last term, this Court recognized that "domestic violence," as used in the Lautenberg Amendment, is different from "violence" in the nondomestic context. "'Domestic violence,'" the Court wrote, "is not merely a type of 'violence'; it is a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context." *Castleman*, 134 S. Ct. at 1411. The Court explained that while "[m]inor uses of force may not constitute 'violence' in the generic sense," such acts are "easy to describe as 'domestic violence,' when the accumulation of such acts over time can subject one intimate partner to the other's control." *Id.* at 1412. The Court further noted that this definition of "domestic violence" is the one "used by the organizations"—such as *amici*—"most directly engaged with the problem and thus most aware of its dimensions." *Id.*

The First Circuit's decision below is animated by the principles that this Court articulated in *Castleman*—that is, "domestic violence" should be differentiated from what is ordinarily understood as violence. The First Circuit noted early in its analysis that "Section 921(a)(33)(A) [the provision defining "misdemeanor crime of domestic violence"]

is a provision crafted in the unique context of domestic violence, and it should be so interpreted." *Voisine*, 778 F.3d at 180 (citing *Castleman*, 134 S. Ct. at 1410-12 & n.4). The decision similarly cited this Court's reasoning in *Castleman* that "domestic violence" is a term of art whose definition embraces a wider spectrum of conduct than violence in the nondomestic context. *Id.* at 181. For these reasons, the court concluded that "§ 922(g)(9)'s unique context, as described in *Castleman* and supported by the legislative history, suggests that § 922(g)(9) should be interpreted more broadly" than other statutory provisions involving crimes of violence. *Id.* at 182.

II. In Domestic Violence Situations, Firearms are Instruments that, Even if Not Fired, Further an Abuser's Coercive Control Over the Victim.

It is an unfortunate reality that "[f]irearms and domestic strife are a potentially deadly combination nationwide." *Hayes*, 555 U.S. at 427 But a firearm need not actually be fired to cause trauma, and this fact was expressly stated by Senator Lautenberg: "In 150,000 cases of abuse, spousal abuse, a gun is present. That means that perhaps it is put to a woman's head or put to her face in front of a child, or children, and even though the trigger is not pulled, the trauma is enormous." 142 Cong. Rec. S10377-01 (1996). Senator Lautenberg was correct. In *amici's* experience with victims of domestic violence, firearms are routinely used by abusers to terrorize and ultimately control the victim.

A. As with all victim support organizations, *Amici* are on the front lines of domestic abuse.

Amici are part of a network of organizations that provide not only support and assistance to victims of domestic abuse but also information and insight on this pervasive crime to government officials, law enforcement agencies, media, and the general public.

Some *amici*—including the Hotline, the Battered Women's Justice Project, and others—provide confidential, one-on-one support to individuals who contact it either by phone ("callers") or live chat over the Internet ("chatters"). Overall, the Hotline has assisted more than 3.85 million people since it took its first call in February 1996.[6] In 2015, the Hotline received approximately 436,329 contacts, including more than 334,917 calls, 85,144 chats, and 16,268 texts. Additionally, the Hotline's website for adult survivors received 1,941,798 web sessions, while the Hotline's teen and youth website received 2,514,623 web sessions.

Almost three out of every four contacts (72%) at the Hotline are victims of domestic abuse.[7] Ninety

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[6] All data referenced in this section are on file with the Hotline.

[7] The remaining 28 percent consists mostly of supportive family, friends, neighbors, and work colleagues asking how to help the survivors. A small percentage of callers are abusers looking for help, and a very small percentage of callers are the general public looking for information, wrong numbers, or prank calls.

six percent of these victims experienced emotional or verbal abuse, including threats. Sixty nine percent experienced physical abuse, such as hitting. And eight percent experienced sexual abuse, including rape.

B. *Amici's* data demonstrate that abusers employ firearms to control and terrorize their victims.

In the spring of 2014, the Hotline conducted an eight-week survey with individuals who utilized the Hotline's phone or chat services, regarding the use of firearms in domestic violence situations.[8] More than 4,700 contacts voluntarily participated in the survey. Hotline advocates asked participants a series of questions, including whether their partners had access to firearms, had threatened to use such firearms, and had in fact used such firearms. Nearly 16 percent of the respondents' partners had access to guns. Of those, 22 percent said their partners, or former partners, had threatened to use a firearm to hurt the victim, their children, other family members, friends, household pets, or to commit suicide. Ten percent said their partner had fired a gun during an argument. Over half said they would feel safer if law enforcement confiscated their partner's firearms. Overall, two-thirds of respondents believed their partners were capable of killing them.

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[8] All survey data and anecdotal responses received are on file with the Hotline. Pursuant to the terms of the survey, and to preserve the safety and confidentiality of the participants, all identifying data are redacted to preserve the survivors' confidentiality.

At the end of the survey, Hotline advocates asked participants an open-ended question: "Is there anything else you would like to tell me about your partner or ex-partner's possession and use of firearms, including examples of how he or she uses firearms to threaten you or others?" Hotline advocates wrote summaries of callers' answers and recorded chatters' responses. The survey revealed that, in an abusive relationship, abusers invoke the mere presence of a firearm to control and terrorize their victims. Callers described a wide variety of single incidents of gun use that haunted them during the course of an abusive relationship, just as Senator Lautenberg had stated. Some examples from callers, which range from subtle intimidation to overt acts and bald threats, include:

- Abuser keeps his firearm in the closet, and goes to the closet while screaming at the victim. The abuser never actually pulls out the firearm, but goes to the area where it is stored.
- The abuser used a firearm to kill the family cat. The abuser frequently held the firearm to the victim's head and said that he would kill her. The abuser often threatened to kill the family and then himself. The two are separated now, but the abuser told the victim that if she ever left, he would wait a few years to kill her so that no one would guess it was him.
- The abuser has a concealed-weapons permit and has put his gun on himself multiple times, and has threatened, "If you ever leave me, I'll kill you."

- The abuser threatened their 5-year-old child that he would shoot the entire family and maybe others.
- The abuser was a military police officer. He told the victim that he was bringing home his guns as a way to threaten her.
- The victim was at a park when the abuser drove by. The abuser told the victim to come to his car, and when she did not, he fired shots into the air to scare her.
- The victim told the police that the abuser had unregistered firearms when she called the police after an assault. The police did not offer to take the weapons. The victim did not feel that the police believed her.[9]

Chatters also detailed a similar assortment of incidents of their abusers tormenting the with firearm use on an ongoing basis, including:

- "He shot a gun at my feet and someone called the police. [He] was arrested on violation of restraining order but gun charges were dropped."
- "[He] never fired the pistol, but he would sit on my chest and point it at my head. He would put it right next to my temple."
- "He's never pointed it at me but he has laid it down on the table to say that I shouldn't,

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[9] These summaries of the callers' responses to the survey question were prepared by the advocates who spoke with the victim caller, documenting the caller's statements.

[']cross that line[']. [Law enforcement took his guns away but] "there's no safe [way] to feel because that doesn't stop him from purchasing other guns."

- "He chased me around the house with the gun in his mouth. It had scared me because he had bought another gun after having it taken away."
- "[He] didn't fire the gun but cocked it while it was pointed to my head [text removed for confidentiality]."
- "He will wave a gun in the air when we're in an argument and say 'I will end you with this and put [you] out of your misery.'"
- "He took out the gun and pointed it at my head. He has left them out, has left the ammunition out."
- "Today, during an argument, he had two fully loaded clips on his belt. He later went into his room and came back with the gun on his holster, which was not there before."
- "[My] husband once threatened me with a gun when I once wanted to stay up to finish baking Christmas cookies. He is a control freak, so he didn't want someone to stay up if he was going to bed."

- "He always told me that he would shoot me when I least expected, like in my sleep. There was always a threat."[10]

Other *amici* report receiving similar anecdotal accounts from domestic violence victims. For example, advocates from End Domestic Abuse Wisconsin have reported:

- A victim of ongoing domestic violence was at a family event at a park with her abuser. As the family was leaving because of heavy rain, the victim could not get the vehicle unstuck from the mud. The abuser became enraged. He pointed a gun at her chest and then fired a shot in the air. The abuser was charged for recklessly using a firearm, but not for intentionally threatening the victim.
- After each argument and domestic violence incident, the perpetrator would go into the family basement and "clean his guns." During one such episode, the abuser fired a gun in the home. The abuser claimed this was an accident, but the victim understood the timing and pattern of the abuser's fixating on and use of his guns as clear and intentional threats.[11]

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[10] These are quotes of the chatters' responses to the survey question. They are unaltered except to redact names in order to preserve the confidentiality of the victims' and abusers' identities.

[11] These anecdotal responses are on file with End Domestic Abuse Wisconsin. Pursuant to the terms of the (continued...)

The upshot of *amici's* collected anecdotal evidence is that there are nearly limitless ways in which firearms can be and are used by abusers to further their coercive control over their victims. This does not necessarily entail firing, or even brandishing, a firearm. Consequently, as discussed more fully below, the purpose of prohibiting individuals who have abused a domestic partner from possessing firearms is not simply to *prevent* homicide or other grave physical injury—it is also to allow victims to *live without fear* of their abusers intentionally using a firearm against them or to threaten them.

III. Including Misdemeanor Domestic Violence Crimes with the *Mens Rea* of "Reckless" within the Prohibition on Firearm Possession in 18 U.S.C. § 922(g)(9) Is Crucial to Effectuating That Statute's Remedial Purposes.

The Lautenberg Amendment was intended to "establish a policy of zero tolerance when it comes to guns and domestic violence." 142 Cong. Rec. S10377-01 (1996). "If Congress had wanted to impose a higher *mens rea*, it could have done so explicitly, as it did in the immediately preceding section of the bill that established §922(g)(9)." *Voisine*, 778 F.3d at 183. But it did not. "Reckless" crimes of domestic violence were intended to be—

(continued...)
survey with the participants, and to preserve the safety and confidentiality of the participants, all identifying data are kept strictly confidential.

and are—included within the prohibitions of § 922(g)(9).

A. The purpose of § 922(g)(9) is to protect victims of domestic violence from further harm by prohibiting individuals with a demonstrated proclivity towards domestic abuse from possessing firearms.

Prior to the enactment of the Lautenberg Amendment in 1996, Congress had previously restricted two types of domestic abusers from owning firearms. First, 18 U.S.C. § 922(g)(1) prohibited gun ownership from any domestic abuser convicted of a felony. Second, individuals who were "subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury" were similarly precluded from possessing a firearm. 18 U.S.C. § 922(g)(8)(B). In short, prior to enacting section § 922(g)(9), Congress had already banned firearm possession by individuals who had a demonstrated propensity to abuse, intimidate, or harass, among other things.

But this framework left open a "dangerous" loophole that permitted a wide range of domestic abusers to continue possessing firearms. *Hayes*, 555 U.S. at 426. This Court has discussed previously some of the "sobering facts" that led Congress to enact the Lautenberg Amendment. *Castleman*, 134 S. Ct. at 1408-09. Neither § 922(g)(1) nor § 922(g)(8) covered domestic abusers who had been convicted of a misdemeanor for their crime. This loophole was particularly dangerous because "many perpetrators

of domestic violence are convicted only of misdemeanors." *Castleman*, 134 S. Ct. at 1409. Indeed, "'many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies.'" *Hayes*, 555 U.S. at 426 (quoting 142 Cong. Rec. 22985 (1996) (statement of Sen. Lautenberg)). As Senator Lautenberg further explained:

> At the end of the day, due to outdated laws or thinking, perhaps after a plea bargain, they are, at most, convicted of a misdemeanor. In fact, most of those who commit family violence are never even prosecuted. But when they are, one-third of the cases that would be considered felonies, if committed by strangers, are instead filed as misdemeanors. The fact is that in many places domestic violence is not taken as seriously as other forms of brutal behavior. Often acts of serious spouse abuse are not even considered as felonies.

142 Cong. Rec. S10377-01 (1996). These facts are explored in greater depth in the Brief of DV LEAP, AEquitas, and Futures Without Violence as *Amici Curiae* in support of Respondent ("DV LEAP Brief"), which *amici* here join in full.

In a nutshell, The Lautenberg Amendment "leaves no doubt that the intent behind the Amendment was to close—completely and without limitation—the loophole in the current law that allowed domestic abusers to possess firearms when properly convicted under misdemeanor statutes for

their acts of abuse." Br. Amici Curiae of United States Senators Frank R. Lautenberg, Dianne Feinstein, and Patty Murray in Support of Petitioner at 9, *United States v. Hayes*, 555 U.S. 415 (2009) (No. 07-608). That previously closed loophole is now at risk of being opened once again.

B. Carving out individuals who have been convicted of a "reckless" crime of domestic violence from the prohibition on firearm possession in § 922(g)(9) would at least partially reopen the loophole that the Amendment was intended to close and would have a devastating effect on domestic violence victims.

Petitioners seek to have the "zero tolerance" policy of the Lautenberg Amendment rewritten to exempt individuals who have been convicted of domestic violence crimes with a *mens rea* of "reckless." This approach is incompatible with the purposes of the Lautenberg Amendment. "The amendment says: Abuse your wife, lose your gun; beat your child, lose your gun; assault your ex-wife, lose your gun; no ifs, ands, or buts." 142 Cong. Rec. S10377-01 (1996). Allowing an individual who has been convicted of a "reckless" crime of domestic violence to own a firearm merely because one snapshot in time was deemed "reckless" rather than "intentional" fails to account for the intentional and patterned nature of domestic violence. Knowing that their abuser's conduct is deemed to be merely "reckless" would be a cold comfort to victims of domestic violence if they must continue to live in fear in the presence of a firearm.

First, allowing domestic abusers convicted of (or plea bargained to) a "reckless" crime of domestic violence to maintain their firearms would be detrimental to the well-being of these abusers' victims. As described in the above anecdotes, *supra* at 15-18, the ways in which abusers use firearms to maintain power and control over their victims are legion; and many do not involve firing the weapon. Indeed, the mere fact that an abuser has a firearm permit can instill fear in a domestic violence victim. *See* Tamara L. Kuennen, *Analyzing the Impact of Coercion on Domestic Violence Victims: How Much is Too Much*, 22 Berkeley J. Gender L. & Just. 2, 8 (2007) ("Another stated 'I have tried to end the relationship, but I am fearful, intimidated Once he came to my office, cried and threatened suicide if I left him. Finally I ended it and since then he makes threats to use any means He has a gun permit.'" (citation omitted)). One district court noted, "a husband can create fear of physical harm against his wife without laying a hand on her, perhaps through verbal threats, nonphysical gestures, or psychological means." *United States v. Huong Thi Kim Ly*, 798 F. Supp. 2d 467, 480 (E.D.N.Y. 2011) *aff'd*, 507 F App'x 12 (2d Cir. 2013).[12] Firearms aid abusers in creating such fear,

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[12] *See also Violence*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining domestic violence as "The infliction of physical injury, *or the creation of a reasonable fear that physical injury or harm will be inflicted*, by a parent or a member or former member of a child's household, against a child or against another member of the household" (emphasis added)); *Coercive Control*, *supra*, at 94 ("[A] victim's level of fear derives as much from her perception of what *could* happen based on past experience as from the immediate threat by the perpetrator.").

and individuals who have demonstrated that they are willing to abuse a domestic partner should not be given that opportunity.

Second, the Court should not mistake "reckless" crimes of domestic violence for being somehow less severe than "intentional" crimes of domestic violence. A leading expert in the field has written, "[i]mportantly, the most devastating effects [of domestic violence] [are] as likely to result from routine but minor violence as from life-threatening assaults." *Coercive Control*, *supra*, at 13-14. Indeed, "it is also clear that different acts, perpetrated by one's intimate partner, while individually not alarming, may accumulate to make a cycle of harm that is impenetrable and debilitating." *Domestic Violence and International Law*, *supra*, at 120. Again, a transactional-level approach to domestic violence—such as classifying a single act as "reckless"—simply gets "domestic violence" wrong.

Third, the result urged by Petitioners would eviscerate the remedial purposes of the Lautenberg Amendment in many situations. Simply put, it would allow individuals who have committed *intentional* domestic violence misdemeanors—and even felonies—to possess firearms. As discussed in greater detail in the DV LEAP Brief, many domestic violence crimes are pleaded down to crimes with a "reckless" *mens rea*. *See also Voisine*, 778 F.3d at 184-85; *Fernandez-Ruiz*, 466 F.3d at 1139 (Wardlaw, J., dissenting). Further, as noted by the First Circuit and several judges from the Ninth Circuit, domestic abusers "'may be drunk or otherwise incapacitated when they commit their crimes,'" which could allow these abusers to argue a reduced level of culpability for their behavior. *Id.* (quoting

Fernandez-Ruiz, 466 F.3d at 1139 (Wardlaw, J., dissenting)). Few would argue that it is a good idea to permit such individuals to retain their firearms, but that is exactly what would happen were this Court to find for Petitioners.

In a similar vein, the "categorical approach" also would effectively allow certain individuals who have committed intentional misdemeanor crimes of domestic violence to possess a firearm.[13] This case would be one such example.[14] As Petitioners themselves assert, under the categorical approach, their conduct is assessed based on the least culpable

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[13] Under the "categorical approach," if a predicate statute is divisible—that is, it contains alternative sets of elements—and the record of the underlying proceedings does not provide enough information to determine under which series of elements the defendant was convicted, *all* possible variants of the statute must fit within the crime being prosecuted regardless of the specific facts of the offense. *See Voisine*, 778 F.3d at 179-80. Appendices B and C to the Brief for the United States provide examples of assault or battery statutes containing multiple culpability levels, including recklessness.

[14] At least Petitioner Armstrong's conduct was more severe than the "reckless offensive physical contact" analyzed under the categorical approach here. As noted by the First Circuit in its prior opinion, "Armstrong's wife called the police on or about December 29, 2008, after, as she described to them, she and her husband had gotten into an argument about baking cookies, and Armstrong pushed her. She pushed him back, and the situation escalated until Armstrong hit her 'hard.' Armstrong was charged and convicted of domestic violence assault under Maine's simple assault statute for 'intentionally, knowingly or recklessly caus[ing] bodily injury or offensive physical contact to Rosanna Armstrong." *United States v. Armstrong*, 706 F.3d 1, 2-3 (1st Cir. 2013) *cert. granted, judgment vacated*, 134 S. Ct. 1759 (2014).

conduct variant of the statute—here, "reckless offensive physical contact." Pet. Br. 2, 11-12. As such, were Petitioners to prevail, domestic abusers would remain free to retain or procure firearms if they are charged under a statute providing multiple *mens reas* and the charging or plea documents do not specify which *mens rea* they are being charged under or pleading to. Such a result cannot have been intended by the Lautenberg Amendment, which intended to close a "dangerous" loophole in the gun-control laws—"no ifs, ands, or buts." 142 Cong. Rec. S10377-01 (1996).

CONCLUSION

For these reasons, *amici curiae* respectfully submit that the decision of the First Circuit should be affirmed.

Respectfully submitted,

ROB (ROBERTA) VALENTE
NATIONAL DOMESTIC VIOLENCE HOTLINE
P.O. Box 161810
Austin, TX 78716
(240) 354-4842
rvalente@ndvh.org

LAUREL PYKE MALSON
Counsel of Record
COLIN M. PROKSEL
JORDAN L. LUDWIG
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W
Washington, DC 20004
(202) 624-2500
lmalson@crowell.com

Counsel for Amici Curiae

KIM GANDY
RON LEGRAND
NATIONAL NETWORK TO END DOMESTIC VIOLENCE
1400 16th Street, NW
Suite 330
Washington, DC 20036
(202) 543-5566

KRISTINE C. LIZDAS
SANDRA L. MURPHY
BATTERED WOMEN'S JUSTICE PROJECT
1801 Nicollet Avenue S
Suite 102
Minneapolis, MN 55403
(800) 903-0111

APPENDIX

APPENDIX

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

The following organizations respectfully submit this brief as *Amici Curiae* in support of Respondent, and urge this Court to uphold the decision of the First Circuit.

The **National Domestic Violence Hotline** (NDVH or the Hotline) is a not-for-profit organization incorporated in Texas in 1996 to assist victims of domestic violence to find safety, support, and appropriate services (www.ndvh.org). The NDVH's dedicated advocates and staff have been the vital link to safety for women, men, children and families affected by domestic violence, responding to calls 24 hours a day, 7 days a week, and 365 days a year. Currently answering more than 430,000 calls and online contacts per year, the NDVH provides confidential, one-on-one support to each caller, offering crisis intervention, options for next steps and direct connection to resources for immediate safety. The NDVH makes referrals to over 5,000 agencies and resources in communities all across the country. The NDVH is a member of the national Steering Committee of the National Task Force to End Sexual and Domestic Violence, which provides a collective national voice for federal, state and local policy makers and domestic violence advocates. The NDVH has responded to over 3.6 million calls for help since first opening the national hotline, and many of these calls are motivated by the victims' fears of firearm violence at the hands of their intimate partners. These calls inform the NDVH's

efforts to work with other national organizations to promote policies and best practices to address victim safety and support. Additionally, the NDVH serves as the co-chair (with The National Network to End Domestic Violence) of the Domestic Violence and Firearms Group of the National Task Force to End Sexual and Domestic Violence Against Women. The NDVH, on behalf of the millions of callers who have reached out to them since 1996, is interested in ensuring that the Lautenberg Amendment remains a robust tool for protecting the safety of victims of misdemeanor crimes of domestic violence.

The **National Network to End Domestic Violence** (NNEDV), a social change organization, is dedicated to creating a social, political and economic environment in which violence against women no longer exists. NNEDV is the leading voice for domestic violence victims and their advocates. As a membership and advocacy organization representing the 56 state and territorial domestic violence coalitions, allied organizations and supportive individuals, NNEDV works closely with its members to understand the ongoing and emerging needs of domestic violence victims and advocacy programs. Then NNEDV makes sure those needs are heard and understood by policymakers at the national level.

The **Battered Women's Justice Project** (BWJP) is a national technical assistance center that provides training and resources for advocates, battered women, legal system personnel, policymakers, and others engaged in the justice system response to intimate partner violence (IPV). The BWJP promotes systemic change within the civil and criminal justice systems to ensure an effective and just response to victims and

perpetrators of IPV, and the children exposed to this violence. The BWJP is an affiliated member of the Domestic Violence Resource Network, a group of national resource centers funded by the Department of Health and Human Services and other support since 1993. The BWJP also serves as a designated technical assistance provider for the Office on Violence Against Women of the U.S. Department of Justice. In an effort to promote more safe and just results for women and their children, the BWJP works at state, national and international levels to engage court systems in methods of accurately assessing the effects of IPV on women and children and to fashion safe outcomes that hold batterers accountable.

End Domestic Abuse Wisconsin (End Abuse) is the leading voice for survivors of domestic violence in Wisconsin. End Abuse is a coalition of domestic violence victim service providers, survivors and concerned individuals, who share a common vision of ending domestic abuse is Wisconsin. Firearms are the most used weapon in Wisconsin domestic violence homicides, more common than all other methods of killings combined. Throughout its over 35-year history, End Abuse has consistently worked to promote rigorous enforcement of firearm safety laws in order to disarm batterers, prevent violence and save lives.

Casa de Esperanza, with National Latin@ Network for Healthy Families and Communities, a project of Casa de Esperanza, is a leading national Latin@ organization. Casa de Esperanza puts community at the center of everything it does. Founded in 1982 to provide emergency shelter for Latinas and other women and children experiencing

domestic violence, today, Casa de Esperanza continues to provide critical and innovative services and support in its Minnesota Twin Cities communities, ranging from family advocacy and shelter services to leadership development and community engagement opportunities for Latin@ youth, women and men, to informing the work of the National Latin@ Network to shape public policy, research, and best practices in the field. The National Latin@ Network provides training and consultations to practitioners and activists throughout the US, as well as in Latin America. Casa de Esperanza and National Latin@ Network organize national and regional events and engage in federal and state public policy advocacy and conduct research on issues that affect Latin@s in the U.S. and abroad.

The **Connecticut Coalition Against Domestic Violence** (CCADV) works to improve social conditions and lead Connecticut's response to domestic violence through policy, advocacy, public awareness, technical assistance, and training. CCADV is a membership organization of Connecticut's 18 domestic violence service agencies that provide critical support to victims including counseling, support groups, emergency shelter, court advocacy, safety planning, and lethality assessment, among other services. Founded in 1978, CCADV works closely with our membership to understand and respond to the on-going needs of domestic violence victims and their families. We seek to support our membership through capacity building, technical assistance and a comprehensive training program. CCADV also works to change social conditions through policy, advocacy, public

awareness and community education. We advocate at a national and state level to create and implement strategic policies that will improve Connecticut's response to domestic violence.

The **First Nations Women's Alliance** seeks to strengthen tribal communities by creating a forum for leaders to come together to address the issues of domestic violence and sexual assault. It is committed to ending all forms of violence by providing culturally relevant services and resources and facilitating the provision of those services by others in our communities.

Jewish Women International (JWI) is the leading Jewish organization empowering women and girls through economic literacy; community training; healthy relationship education; and the proliferation of women's leadership. JWI's innovative programs, advocacy and philanthropic initiatives protect the fundamental rights of all girls and women to live in safe homes, thrive in healthy relationships, and realize the full potential of their personal strength. In particular, JWI confronts the issue of violence against women and girls from many sides, from prevention programming for teens and young adults to education and training for thousands of professionals and advocates.

The **Kentucky Coalition Against Domestic Violence** is a nonprofit organization founded in 1981 and incorporated in the State of Kentucky. It is dedicated to advocating for safety and justice for battered men and women and their children, and provides comprehensive services to families in all one-hundred twenty counties of the Commonwealth,

through fifteen shelter programs located across the state.

Legal Momentum, the Women's Legal Defense and Education Fund, is the oldest women's legal advocacy group in the United States. Legal Momentum served at the helm of the National Task Force to End Sexual and Domestic Violence Against Women, which led efforts to pass the Violence against Women Act (VAWA) in 1994, and its subsequent reauthorizations in 2000, 2005 and 2013. Since VAWA's inception, Legal Momentum has assisted the U.S. Department of Justice, federal agencies, state and local governments, and private entities with developing and implementing policies to protect victims of domestic and intimate partner violence. Additionally, since 1980, Legal Momentum's National Judicial Education Program has educated and trained thousands of judges and court officials nationwide on gender bias issues related to domestic and partner violence.

The **National Coalition Against Domestic Violence** is the voice of victims and survivors. We are the catalyst for changing society to have zero tolerance for domestic violence. We do this by effecting public policy, increasing understanding of the impact of domestic violence, and providing programs and education that drive that change.

The **National Council of Jewish Women** (NCJW) is a grassroots organization of volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions

state that the organization endorses and resolves to work for "Laws, policies, programs, and services that protect every woman from all forms of abuse, exploitation, harassment, and violence." Consistent with our Priorities and Resolutions, NCJW joins this brief.

The **National Network to End Domestic Violence** (NNEDV) is a non-profit membership and advocacy organization dedicated to ending domestic violence through legal, legislative, and policy initiatives. The leading voice for domestic violence victims and their advocates, NNEDV comprises a network of 56 state and territorial coalitions against domestic violence representing over 2,000 local organizations that provide shelter, advocacy, and counseling and legal services to victims and survivors of domestic violence and their families.

The **National Organization for Women Foundation** is a 501(c)(3) education and litigation organization founded in 1987 to promote equal rights for women of women and for decades has worked to end domestic violence against women.

Since 1993, the **National Resource Center on Domestic Violence** (NRCDV) has provided comprehensive and individualized technical assistance, training and resource development related to domestic violence intervention and prevention, community education and organizing, and public policy and systems advocacy. The NRCDV strives to be a trusted national leader and sustainable organization, renowned for innovation, multi-disciplinary approaches, and a commitment to ensuring that policy, practice and research is grounded in and guided by the voices and

experiences of domestic violence survivors and advocates.

The **Nevada Network Against Domestic Violence** provides statewide advocacy, education and support of the front-line organizations that help those impacted by domestic violence.

The **New Hampshire Coalition Against Domestic and Sexual Violence** creates safe and just communities through advocacy, prevention and empowerment of anyone affected by sexual violence, domestic violence and stalking.

The **New Jersey Coalition to End Domestic Violence** provides leadership, support and resources on the prevention of domestic violence for all victims in New Jersey through advocacy, education and training, technical assistance and community awareness.

Praxis International is a nonprofit corporation, which works towards the elimination of violence in the lives of women and their children. It is the mission of Praxis International to join with other progressive social change organizations and programs to work toward the elimination of oppression in our society. Specifically, Praxis focuses on the many ways that violence is used to subjugate women.

The **Vermont Network Against Domestic and Sexual Violence** is a coalition of 14 member domestic and sexual violence agencies throughout the state.

The **Washington State Coalition Against Domestic Violence** (WSCADV) is a statewide membership organization of over 70 domestic

violence victim advocacy programs and shelters across Washington State. The mission of WSCADV is to end domestic violence through advocacy and action for social change.